IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,
Petitioners,

v.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

GERALD C. MANN,
Attorney General of Texas;
E. R. SIMMONS,
JAMES D. SMULLEN,
Assistant Attorneys General
Counsel for Petitioner
Railroad Commission of Texas
and its Members;
W. EDWARD LEE,
JOHN PORTER,
Counsel for Petitioners O. L.
Hastings and C. P. Dodson.

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To the Honorable Supreme Court of the United States:

Petitoners cannot allow to go unchallenged certain statements of law and fact contained in respondents' brief. Hence we take the liberty of filing a reply brief as permitted by Rule 27 of this Court.

REPLY TO RESPONDENTS' STATEMENT OF THE NATURE OF THE CASE

Respondents state in their brief (p. 3) that the trial court sustained Petitioners' motion for judgment "upon the theory that cases of this character

are not cognizable in the Federal courts." (R., 102-103, 108-109).

It is true that the court by remarks during the trial entertained doubt that he could substitute his judgment and discretion for that of the Texas Railroad Commission as to the necessity of another well and that he referred to the *Rowan & Nichols cases.* (310 U. S. 573; 311 U. S. 614; 311 U. S. 370). Be that as it may, the court filed no opinion and in granting petitioners (defendants there) a judgment he was acting upon a motion for judgment at the conclusion of respondents' (plaintiffs there) evidence that "there is absolutely no evidence here to justify this court in overturning the Railroad Commission order under attack" (R., p. 100), and that "on the broadest basis you can place the lawsuit, they have not overcome the *prima facie* validity of that order" (R., 101).

It was THIS MOTION and THIS GROUND that the trial court sustained. His judgment, omitting formal parts, recites:

> " * * * *the plaintiffs have failed to introduce sufficient evidence to justify the Court in granting the relief prayed for against the order of the Railroad Commission of Texas, complained of herein.*"
>
> "It is Therefore Ordered, adjudged and Decreed by the Court that the Plaintiffs Selby Oil & Gas Company and Lewis Production Company, take nothing by their suit, * * * " (Emphasis Supplied; quotation from Record, pps. 49-50).

This alone was specified as the error of the trial court by respondents (appellants there) in the Circuit Court of Appeals. (See Appellants' brief in Circuit Court of Appeals, p. 3).

REPLY TO RESPONDENTS' STATEMENT OF THE TESTIMONY AND TO RESPONDENTS' COUNTER-POINT II.

Respondents call to the attention of the Court (Brief, p. 3) that the Examiner who held the Commission hearing on the application for the permit, stated that "The testimony (before the Commission) was that on the spacing arrangement there is no immediate loss of oil on Applicant's lease." (Ex. 6; R., 59, 70). The same quotation is given by respondents under Counter-Point II at page 21 of their brief.

We are at a loss to understand why respondents would place emphasis upon an examiner's ideas about the evidence offered before the administrative body since respondents offer the Texas Supreme Court case of *Cook Drilling Company, et al* v. *Gulf Oil Corporation*, 139 Tex. ....., 161 S. W. 2d 1035, 1036, as a fair statement of Texas law. A portion of the opinion in this case quoted by respondents at page 15 of their brief provides:

> "The trial contemplated by the Act in question (Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925) is not for the purpose of deter-

> mining whether the Commission actually heard sufficient evidence to support its order, but whether there then existed sufficient facts to justify the entry thereof. * * * "

See also the quotation supplied by respondents from *Railroad Commission of Texas, et al* v. *Shell Oil Co., Inc.*, 139 Tex. ....., 161 S. W. 2d 1022, 1029-1030, at pages 16 through 18 of their brief; and in addition, see the Texas case of *Empire Gas and Fuel Company* v. *Railroad Commission of Texas* (Tex. Civ. App.) 94 S. W. 2d 1240, writ of error refused by the Texas Supreme Court, holding that an examiner's memorandum "is not binding on the Commission, nor does it constitute an official act of the commission until approved and made a part of the commission order."

Respondents' summary of the evidence (Brief pps. 3-6); indeed, respondents entire case is predicated upon the assumption that an order of the Texas Railroad Commission granted to prevent "confiscation" (drainage) may be set aside if upon a comparison of the tract in suit with *all surrounding tracts* the tract in suit has an advantage rather than a disadvantage. HERE LIES THE KEY TO RESPONDENTS FAILURE TO OFFER SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTIVE VALIDITY OF THE PERMIT ORDER.

Note carefully the following statement contained in Respondents' Brief, page 6:

> "If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92) *Such an area, however, did not take into account all of the* 149.8 *acres included in the surrounding leases.*" (R., 74-75.) (Emphasis supplied).

Indeed, such an eight times area comparison does not take into consideration all of the 149.8 acres included in the surrounding leases. Eight times the area of the tract outside of it is 30.80 acres*. Such a comparison is the method generally employed under Texas law in determining whether there be drainage advantage or disadvantage for small tracts, *Magnolia Petroleum Company* v. *Railroad Commission* (Texas Civ. App.) 127 S. W. 2d 223, writ of error denied by the Texas Supreme Court. The purpose of the rule is to afford a reasonable media of comparison within a reasonable drainage area as contemplated by the spacing rule.

A comparison of the tract with the 149.8 surrounding acres is a comparison of the tract with an area 38 times its size. Never within the knowledge of counsel for petitioners has the Texas Railroad Commission or the courts of this state cast aside the eight-times area comparison in determining drainage advantage or disadvantage for small tracts, although many have been the attempts by owners of large tracts in the East Texas field to induce the

*The tract was 3.85 acres (R., 107)

Texas Railroad Commission and the Texas courts to accept other methods. We are confident that this Court will be equally unresponsive to such efforts.

What did this Court mean in the *Rowan and Nichols cases* in saying it would not substitute its judgment and discretion in the matter of conserving Texas natural resources for the agency the people of Texas chose? What did the Texas Supreme Court mean when it said that the courts of Texas would not substitute their discretion for that committed to the agency by the Legislature, but would sustain the agency if it is reasonably supported by substantial evidence before the court? (See *Railroad Commission of Texas, et al.*, v. *Shell Oil Company, Inc., et al.* 161 S. W. 2d 1022, 1029).

The meaning of the highest Court of the United States and the highest Court of Texas is plain when a litigant attempts what these respondents attempted in the lower court. Respondents offered not one scintilla of evidence about "confiscation" (drainage) upon the basis long employed by the administrative agency and the courts of Texas. Can it now be so obscure—even to respondents—why the trial court held that "plaintiffs have failed to introduce sufficient evidence to justify the court in granting the relief prayed for against the order of the Texas Railroad Commission?" (R., p. 50)

REPLY TO RESPONDENTS' COUNTER-POINT I

(Respondents' Brief, pps. 8-19)

Respondents conclude their Counter-Point I by saying:

> "Obviously the trial court had jurisdiction of both claims involved in this suit, and respondents had a right to have the issue of fact determined by the trial court." (Brief, p. 19)

Here lies the fallacy in respondents eleven printed pages of argument. *The trial court did not dismiss for want of jurisdiction.* It denied respondents relief for failure to offer sufficient evidence to overcome the *prima facie* validity of the permit order of the Texas Railroad Commission (R., p. 49-50).

Nor do the *Rowan and Nichols cases* say that a federal district court does not have *jurisdiction* of cases involving a state's conservation laws. Those cases do hold that jurisdiction in such cases once invoked should be exercised by a trial court advisedly and that in such cases the court should ordinarily stay its hand and refrain from exercising the power it admittedly holds as a caution against substituting its notions of the proper administration of a state's conservation laws for that of the state. Had the trial court followed respondents' theory in the instant case it would have so substituted. In Texas the conservation agency and the courts hold that in determining drainage advan-

tage or disadvantage of a small tract an eight times area method of comparison is a reasonable one. Respondents sought cancellation of the permit order based upon a 38-times area comparison.

Petitioners have argued at length in their briefs in this cause and in the companion case of *G. E. Burford, et al.*, v. *Sun Oil Company, et al.*, No. 495, October Term, 1942, what they believe to be the proper scope of review by the federal courts in cases involving conservation of a state's natural resources. We shall not burden the court by a reiteration of that argument here.

REPLY TO RESPONDENTS' COUNTER-POINT III.

(Brief pps. 22-23)

Respondents' Counter-Point III likewise proceeds upon the erroneous assumption that the trial court held it had no *jurisdiction* to hear the case. Here again we point out that the trial court not only did not hold it had no jurisdiction and dismiss the cause; but that on the contrary the trial court assumed jurisdiction by hearing the cause and then proceeded to render judgment that respondents take nothing because they had not made out a case *on the evidence they offered.* (R., 49-50).

No evidence at all was offered that the tract in suit did not need the well permit to prevent "confiscation," drainage, upon the method of determination generally employed by the Texas Rail-

road Commission and the Texas Courts—an eight times area comparison. Indeed, upon cross-examination respondents' expert witness admitted that upon such a comparison the tract in suit was at a 37½% density disadvantage. (See respondents Brief, page 6).

The trial court having determined that the plaintiffs had failed to introduce sufficient evidence to prove their case; it would seem indisputable that in the trial court's opinion there was no evidence upon which to make findings. Whether or not there was evidence sufficient to make out a case was a question of law which the Circuit Court of Appeals should have passed upon if respondents are correct in their contention that federal courts will pass on questions of state law in cases involving conservation of a state's natural resources.

Respectfully submitted,

GERALD C. MANN, Gerald C. Mann
Attorney General of Texas;
E. R. SIMMONS, E. R. Simmons
JAMES D. SMULLEN, Jas. D. Smullen
Assistant Attorneys General
Counsel for Petitioner
Railroad Commission of Texas
and its Members;
W. EDWARD LEE,
JOHN PORTER,
Counsel for Petitioners O. L.
Hastings and C. P. Dodson.